

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re MARY L., a Person Coming Under
the Juvenile Court Law.

KERN COUNTY DEPARTMENT OF
HUMAN SERVICES,

Plaintiff and Respondent,

v.

MICHELLE B.,

Defendant and Appellant.

F073776

(Kern Super. Ct. No. JD132039-00)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Kern County. Louie L. Vega,
Judge.

Jeanette Freeman Cochran, under appointment by the Court of Appeal, for
Defendant and Appellant.

Theresa A. Goldner, County Counsel, and Amanda LeBaron, Deputy County
Counsel, for Plaintiff and Respondent.

-ooOoo-

* Before Gomes, Acting P.J., Kane, J., and Detjen, J.

Michelle B. (mother) appeals from the juvenile court's orders denying her petition for modification under Welfare and Institutions Code section 388¹ (section 388 petition) and terminating her parental rights under section 366.26 as to her now six-year-old daughter Mary L. Mother contends the juvenile court erred in denying her section 388 petition because she demonstrated that her circumstances had changed and that her proposed modification served Mary's best interests. Mother also contends the juvenile court erred in not applying the beneficial parent-child relationship exception to adoption (§ 366.26, subd. (c)(1)(B)(i)). We affirm.

PROCEDURAL AND FACTUAL SUMMARY

Three-year-old Mary was adjudged a juvenile court dependent in March 2014 after the court sustained allegations that mother and Mary's father, David,² failed to protect her from her paternal uncle who had a known history of sexual abuse and had been convicted of lewd and lascivious acts with a child under the age of 14. The court ordered family maintenance services for David and the Kern County Department of Human Services (department) placed Mary in his custody. The court ordered family reunification services for mother. Both parents were required, as part of their court-ordered plans, to participate in counseling for failure to protect from sexual abuse (sexual abuse counseling) and to submit to random drug testing. Mother's services plan also required her to comply with any recommended mental health treatment and to visit Mary twice weekly for two hours under the department's supervision. The court ordered that Mary was to have no contact with her uncle.

The juvenile court continued services for mother and David at a review hearing in mid-September 2014. Up to that point, mother's progress had been minimal. Less than two weeks later, the department removed Mary from David's custody after discovering

¹ Statutory references are to the Welfare and Institutions Code.

² David did not appeal the juvenile court's termination order.

that David allowed the uncle into his home. The department filed a supplemental petition (§ 387) which the juvenile court sustained. The court ordered Mary removed from David's custody and ordered reunification services for him.

In March 2015, the juvenile court conducted a 12-month review hearing and terminated mother's reunification services because she had not completed any of them and her progress was minimal. Eight months later, in November, the juvenile court conducted a 12-month review hearing to assess David's compliance. By that time, Mary had been placed with a paternal great aunt and uncle who were willing to adopt her if reunification efforts failed. David had refused to participate in sexual abuse and substance abuse services and to submit to random drug testing. Consequently, the court terminated his reunification services and set a section 366.26 hearing for March 2016.³ The hearing was subsequently continued until May 2016.

Meanwhile, in April 2016, mother filed a section 388 petition, asking the juvenile court to return Mary to her custody under family maintenance services or reinstate family reunification services. Mother alleged she completed substance abuse treatment, was participating in sexual abuse counseling and consistently visited Mary. She further alleged her proposed modification would be better for Mary because Mary was bonded to her and wanted to live with her and because it was better for Mary to grow up with her mother.

In May 2016, the juvenile court conducted a combined hearing under sections 388 and 366.26. The department recommended the juvenile court deny mother's section 388 petition because, even though she completed substance abuse counseling and was

³ Mother and David challenged the juvenile court's setting order by writ petition (Cal. Rules of Court, rules 8.450-8.452) which we dismissed as facially inadequate. (*Michelle B. v. Superior Court* (March 3, 2016, F072750) [nonpub. opn.])

residing in a sober living house, she had not completed the sexual abuse counseling and tested positive for marijuana as recently as March 2016. The department also recommended the court terminate parental rights, opining Mary was adoptable based on her young age and the absence of any significant medical problems or developmental delays. Additionally, the department believed Mary would suffer only minimal emotional trauma if parental rights were terminated because she had a “minimal visiting relationship” with her parents and had integrated well into the adoptive parents’ family.

Mother testified she completed 17 of the 26 required classes to complete sexual abuse counseling but was dropped from the program because of an unexcused absence. She had since re-enrolled and had completed three classes. She also testified she had not missed any visits during the preceding year. She did not dispute however, when questioned on cross-examination, that she only attended 30 percent of the visits following Mary’s initial removal in 2014. Mother said Mary was excited to see her and visits went well. Mary called her “Mommy” and sometimes cried when the visit ended. Mother’s plan, if Mary were returned to her, was to live with her temporarily at the sober living house and then rent a house.

The juvenile court denied mother’s section 388 petition and terminated parental rights.

DISCUSSION

I. Section 388 Petition

Mother contends the juvenile court abused its discretion in denying her section 388 petition. We disagree.

“A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child. [Citation.] The parent bears the burden to show both a legitimate change of circumstances and that undoing the prior order would be in the best interest of

the child. [Citation.] Generally, the petitioner must show by a preponderance of the evidence that the child's welfare requires the modification sought." (*In re A.A.* (2012) 203 Cal.App.4th 597, 611-612.)

"A petition for modification is 'committed to the sound discretion of the juvenile court, and the trial court's ruling should not be disturbed on appeal unless an abuse of discretion is clearly established. [Citations.]' [Citations.] '... "[']The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court. ' ' [Citation.]' " (*In re A.R.* (2015) 235 Cal.App.4th 1102, 1116-1117.)

"Not every change in circumstance can justify modification of a prior order. [Citation.] The change in circumstances must relate to the purpose of the order and be such that the modification of the prior order is appropriate. [Citations.] In other words, the problem that initially brought the child within the dependency system must be removed or ameliorated. [Citations.] The change in circumstances or new evidence must be of such significant nature that it requires a setting aside or modification of the challenged order. [Citations.]" (*In re A.A., supra*, 203 Cal.App.4th at p. 612.)

Section 388 serves as "an 'escape mechanism' when parents complete a reformation in the short, final period after the termination of reunification services but before the actual termination of parental rights." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528.) It is not enough for a parent to show an incomplete reformation or that he is in the process of changing the circumstances which led to the dependency. "After the termination of reunification services, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point 'the focus shifts to the needs of the child for permanency and stability' [citation].... A court hearing on a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is,

the best interests of the child.” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) “ ‘A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent ... might be able to reunify at some future point, does not promote stability for the child or the child’s best interests.’ ” (*In re Mary G.* (2007) 151 Cal.App.4th 184, 206.)

The primary reason Mary was removed from mother’s custody was because mother failed to protect her from sexual abuse. As a result, the juvenile court ordered mother to complete a six-month sexual abuse counseling program comprised of 26 weekly classes. When the juvenile court terminated mother’s reunification services in March 2015, she had only attended 17 of the 26 required classes despite having had a full year to complete the program. She was dropped from the program apparently not long after and re-enrolled in late April 2016, approximately a year later, and was required to start at the beginning. By the hearing on her petition in May 2016, she had completed three classes of the 26 classes and, according to the department, would not complete the program until October 2016. Consequently, mother was no closer to completing the program at the hearing on her section 388 petition than she was when her services were terminated. In fact, she had substantially regressed. On that evidence alone, the juvenile court could find mother failed to establish a change in circumstances.

We, thus, conclude mother failed to establish her circumstances had changed since the juvenile court terminated her reunification services. Further, mother’s failure to do so is fatal to her request for a modification. Consequently, we need not consider whether mother’s requested change would promote Mary’s best interest and conclude the juvenile court properly exercised its discretion in denying her section 388 petition.

II. Parental Benefit Exception to Termination of Parental Rights

Section 366.26 governs the proceedings at which the juvenile court must select a permanent placement for a child adjudged its dependent. If the court determines it is likely the child will be adopted, the statute requires the court to terminate parental rights.

(§ 366.26, subd. (c)(1).) The court’s prior finding that it would be detrimental to return the child to parental custody, and its order terminating reunification services, constitute a sufficient basis for terminating parental rights unless the court finds that one of the six exceptions specified in section 366.26, subdivision (c)(1)(B) would render termination of parental rights detrimental to the child. The party seeking to establish the existence of one of the section 366.26, subdivision (c)(1) exceptions bears the burden of producing the evidence. (*In re Megan S.* (2002) 104 Cal.App.4th 247, 252.)

When a juvenile court concludes that the party with the burden of proof did not carry the burden and the court rejects a detriment claim and terminates parental rights, the first issue on appeal is whether the evidence compels a finding for appellant as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571.) “Specifically, the question becomes whether the appellant’s evidence was (1) ‘uncontradicted and unimpeached’ and (2) ‘of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.’ ” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) If appellant prevails, then the next question is whether the existence of that relationship constituted a “ ‘compelling reason for determining that termination would be detrimental’ ” (§ 366.26, subd. (c)(1)(B)), thus rendering the juvenile court’s termination order an abuse of discretion. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1315.) We conclude mother failed to establish the existence of a beneficial relationship as a matter of law.

Mother contends the beneficial relationship exception applied because she maintained regular visitation and contact with Mary over the previous year and Mary had a positive relationship with her. As proof, mother cites Mary’s statement to the adoption social worker when asked where she would like to live. Mary responded, “With my mom, of course, because I really love her.” She further stated, “I wish I could live with her,” and “I really want to see her.” Mother further cites Mary’s excited response to seeing her, the fact that she referred to her as “Mommy” and demonstrated she did not want visits to end by holding onto her sleeve, necklace or purse and sometimes crying.

Assuming that mother regularly visited and maintained contact with Mary, she failed to show that Mary would benefit from continuing the relationship. “To meet the burden of proving the section 366.26, subdivision (c)(1)(B)(i) exception the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits—the parent must show that he or she occupies a parental role in the life of the child.” (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1527.)

By the time of the section 366.26 hearing in May 2016, Mary had spent over two years out of mother’s custody. Her only contact with mother was during visitation which had for the most part been supervised the entire dependency.⁴ Further, though mother and Mary were affectionate and loving together, there is no evidence that Mary viewed mother as a parental figure. On the contrary, according to the department, Mary regarded her caretakers as her parental figures and mother as a friendly visitor.

Further, even if mother had established a beneficial relationship, she would be hard pressed on this evidence to show that terminating her parental rights would be detrimental to Mary. There was indisputable evidence that Mary was adoptable and that her caretakers wanted to adopt her. Further, mother offered no evidence that terminating parental rights would be detrimental to Mary.

We conclude the evidence in this case does not compel a finding as a matter of law that mother had a beneficial relationship with Mary. Consequently, the beneficial relationship exception to adoption does not apply and the juvenile court did not err in terminating mother’s parental rights. Thus, we affirm.

DISPOSITION

The orders of the juvenile court are affirmed.

⁴ According to the department, mother had some unsupervised visits in early 2014 but they were not documented.